United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-1420

Sec B P/S

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-against-

Docket No. 75-1420

GLEN A. SNOW

Appellant.

APPELLANT'S BRIEF

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PRELIMINARY STATEMENT

The appellant, Glen A. Snow and Samuel Snow, were indicted by the Grand Jury of the Federal District Court, or the Northern District of New York and accused in one count with conspiracy to violate Title 21, United States Code, Section 341 (a)(1). It was alleged that the defendants conspired to distribute a controlled substance, to wit; approximately one-half ounce to one ounce of cocaine. The defendants were jointly tried before a jury of twelve and Hon. Lloyd F. MacMahon in Syracuse, New York. At the conclusion of said trial the jury rendered a verdict of guilty. Thereafter the Hon. Lloyd F. MacMahon pronounced sentence and sentenced the appellant Glen A. Snow to a sentence of probation for a period of three (3) years. The appeal is timely taken.

STATEMENT OF CASE

The indictment accused the appellant, Glen A. Snow and Samuel Snow with conspiracy to violate Title 21, United States Code, Section 841 (a)(1) in that the defendants conspired to distribute cocaine.

The indictment included a list of four overt acts, which the defendants allegedly performed in furtherance of said conspiracy. The indictment specified that the purported crime accused from on or about April 4, 1975 to on or about April 25, 1975 at Ausable Forks, New York.

By notice of motion dated August 7, 1975, the appellant motioned the trial Court for a bill of particulars, requesting among other things, the dates, places and names of participants of each and every overt act that it would be alleged to have accused in furtherance of the crime.

The government in its bill of particulars re-affirmed the four over acts and set forth one additional overt act concerning an April 10, 1975 trip to New York City, which had not been alleged in the indictment.

The government in its reply papers also stated that it assumed an obligation to provide continuing information concerning future overt acts which became known in the future and about which the government may introduce evdience at trial.

Subsequently, the government permitted defense counsel to listen to certain recordings of conversations allegedly between Glen Snow and Federal Agent Mangor.

The matter was called for trial and the defendant was jointly tried before Hon. Lloyd F. MacMahon at Syracuse.

Defense counsel were given the 3500 material and the government's opening statement again propounded the theory of a two man conspiracy consisting of the five overt acts previously alleged.

During the trial the government's informant, after being granted full immunity, testified as to certain overt acts which occurred subsequent to April 10, 1975. These alleged overt acts were not contained within the bill of particulars. At no

time prior to this testimony was the defendant apprised of these additional overt acts which allegedly constituted part of the crime. The Court, nevertheless, over defense counsel's objection, permitted the overt acts not contained in the bill of particulars to be admitted into evidence. At this stage of the proceeding the government shifted its theory in showing other persons unknown at the time of the indictment to be participating in this over all conspiracy and the government changed the status of the informant to that of co-conspirator by showing a sale to his fellow employee.

After summation, the Court in the charge to the jury, instructed the jury in such a manner as to vary the indictment with the proof, and in effect, amended the indictment to conform with the proof by his charge, and created new conspiracy allegations.

STATEMENT OF FACTS

During the latter part of March and early April, 1975, the informant, Jules Votraw allegedly made a deal with Agents Mangor and Fitzpatrick concerning his cooperation in certain government investigations involving drugs in Essex and Clinton Counties of the Northern District of New York. The informant, who had previously had difficulty with the law, agreed to this cooperation and set a meeting up in Ausable Forks, New York. The meeting was set up by informant Votraw who told Samuel Snow that he and his cousin, Paul, wanted to talk to Glen Snow. Later that evening a similar conversation was alleged to have been had between Samuel Snow and Agent Mangor.

Later on certain telephonic communications were had between Glen Snow and Agent Mangor and there was a later transfer of some two hundred dollars which was supposed to be used for the purchase of half an ounce of cocaine. Glen Snow was alleged to have borrowed certain money from the National Commercial Bank and Trust Company for the purpose of financing this drug transaction and then a trip was made to New York City.

The testimony on the part of the informant was that prior to arriving in New York City, Glen Snow gave back the two hundred dollars that was obtained from the agent and then the informant testified that certain cocaine was purchased and that there was tasting and cutting of the drug in the Riverside Drive apartment in New York City and that the informant, Glen Snow and Samuel Snow returned to Brewster, New York, at which time the informant took the drugs and sold them to a fellow employee.

There were a number of telephone conversations between Glen Snow and Agent Mangor. Only one telephone conversation involved Samuel Snow and it was nothing more than a greeting.

Subsequently Agent Mangor testified that he had a conversation with Glen Snow concerning the availability of future drugs for him. Later on Samuel Snow informed Agent Mangor that he could obtain certain cocaine if he would front the venture with approximately six hundred fifty dollars. Samuel Snow, mindful of the fact that Agent Mangor was an undercover agent, took the six hundred fifty dollars without any intention of buying any drugs or doing anything except take Agent Mangor's money.

PRELIMINARY ISSUES

1. Was the appellant given a fair trial before the Hon. Lloyd F. MacMahon? No.

2. Did the Court err in permitting the testimony concerning overt acts not in the bill of particulars? Yes.

3. Did the Court's participation and comments render it impossible to obtain a fair trial? Yes.

4. Did the Court's tyranny of appellant's counsel violate his Sixth Amendment rights of effective assistance of counsel? Yes.

5. Did the Court err in not granting judgment at the end of the prima facie case? Yes.

6. Did the Court err in not giving the proper instructions consistent with the indictment? Yes.

7. Did the Court err in not granting the appellant's motion to arrest the judgment? Yes.

8. Did the Court make prejudicial remarks which rendered a fair and impartial trial impossible? Yes.

POINT I

IT WAS ERROR FOR THE COURT TO ALLOW TESTIMONY AS TO OVERT ACTS NOT CONTAINED IN THE GOVERNMENT'S BILL OF PARTICULARS.

The indictment herein charges the appellant Glen Snow and Samuel Snow with conspiracy to distribute cocain between April 4, 1975 and April 25, 1975. The indictment further alleged four overt acts which the defendants allegedly committed in furtherance of the conspiracy.

After arraignment, the defendants motioned the Court for a Bill of Particulars, requesting information as to each and every overt act the government would allege to have occurred between on or about April 4, 1975 and on or about April 25, 1975.

The government responded with a Bill of Particulars which re-affirmed the four overt acts alleged in the indictment and set forth one additional alleged overt act allegedly committed in furtherance of the conspiracy.

The government in its papers states that it would provide the requested information for an overt act then known to the government, about which it may produce evidence at trial, and further that it would provide information for any other overt acts which became known to the government in the future and about which it may introduce evidence at trial.

The government therefore specifically recognized the continuing duty to provide discovery information in the future.

Nevertheless, at trial, the government introduced evidence of other alleged overt acts, through an information witness, which acts were never prior to trial either alleged in the indictment or the Bill of Particulars.

The defendant relied upon the government representation in the Bill of Particulars and was taken by complete surprise by this testimony at trial. Despite the fact that defendant obejcted to receipt of this evidence, the Court allowed it in.

A Bill of Particulars is intended to apprise the defendant of the charges against him in order to avoid prejudicial surprise at trial, to enable him adequately to prepare his defense and to protect him against the possibility of being charged a second time with the same offense. (US vs White, D.C. Ga, 1970, 50 F.R.D. 70, aff. 450F.2d 264; Tritt vs US, C.A. Utah 1970, 421F.2d 928; US vs Braun, C.A. N.Y. 1964, 335F.2d 170; US vs Basen, D.C. Pa. 1970, 308 F. Supp. 65; US vs Leach, C.A. Mass. 1970, 427 F.2d 1107)

In conspiracy cases, if the government is relying upon proof of specified acts to prove guilt, then the defendants who allegedly performed such acts should be given sufficient particulars to fairly apprise them of the transactions to be proved so they will have reasonable opportunity to meet charges of performing the specific acts. (US vs Agnello, D.C. N.Y. 1973, 367 F. Supp 444)

The government has a duty to inform defendants of any

other specific overt acts which become known to it after indictment and which it intends to use at trial. (US vs Covelli, D.C. Ill. 1962, 210 F. Supp 589; US vs Tanner. D.C. Ill. 1967, 279 F. Supp 457; US vs Ahmad, D.C. Pa. 1971 53 F.R.D. 191)

When a Bill of Particulars has been furnished to the defendant, as in the instant case, the government is strictly limited to the particulars which it has specified and the Court should confine the government to proof of facts so specified. (Braatelien vs US, C.C. A.N.D., 1945, 147 F.2d 888; US vs Murray, C.A. N.Y., 1962, 297 F.2d 812; US vs Haskins, C.A. Tenn., 1965, 345 F. 2d 111; US vs Armco Steel Corp., D.C. Cal., 1966, 255 F. Supp. 841)

The defendants were completely surprised at trial by testimony of these additional alleged overt acts, which in essence charged the government theory of prosecution to a larger over all conspiracy. The defense was unprepared to defend against these allegations, having heard this for the first time during trial.

The jury may have compeltely disregarded those overt acts alleged in the indictment and bill of particulars and convicted the defendant solely on the overt acts alleged for the first time at trial.

The introduction of this evidence was error and the conviction should be reversed and the indictment dismissed.

POINT II

APPELLANT, GLEN SNOW, WAS NOT GUARANTEED A FAIR TRIAL.

A review of the record shows that the Hon. Lloyd F. MacMahon criticized and commented on the performance of the defense counsel before the jury and he participated not only in the direct but the cross-examination of witnesses. Judge MacMahon, an experienced trial lawyer and jurist, took over the essential questioning that connected facts together in the case. The Court's appearance and participation in the fact-making process deprived the appellant of a fair trial. The excessive participation and comments on the part of the Court in a case where the evidence against the appellant was slight, in all probability was the factor that caused the conviction of the appellant. Holmes vs US 271 Fed. 2d 63; US vs Gulielmin 384 Fed. 2d 602; US vs Perciso 305 Fed. 2d 534; US vs DeSicto 289 Fed. 2d 833.

The Sixth Amendment of the United States Constitution guarantees that a defendant will be assured of effective assistance of counsel. The Court acts as a monitor in the trial process and is the one who has an ultimate obligation in insuring that the defendant is given a full and fair trial. A part of that fair trial is to insure that counsel is adequate and effective. The Threats and the criticisms and insults by the Court and the power of contempt under 18 U.S.C. Section 401 have the effect of forcing counsel to defend himself opposed to defending the

defendant. The record speaks for itself.

The conviction of the appellant must be reversed on the grounds that he was not granted a full and fair trial.

POINT III

THE COURT ERRED IN NOT GRANTING THE ARREST OF JUDGMENT.

The Court in its instructions spoke of a multiple conspiracy which varied from the indictment and the necessary proof. The Court;s instruction, though not obejcted to at the time it was given, was plain error and should have resulted in the setting aside of the veridct against the appellant. As is set out in the motion to arrest judgment on pages 422 to 424 of the record, there is a showing of a multiple consipracy opposed to the single conspiracy charged in the indictment. US vs Irzzo 491 Fed. 2d 1355; US vs DeMarco 488 Fed. 2d 828; US vs Mapp 476 Fed. 2d 67. The Court should have set aside the verdict against the defendant. The Court's error in not setting it aside requires that the conviction be reversed.

The Court should have arrested the judgment since the Court lacked jurisdiction in this conspiracy. If the government witness is to be believed at all, the only true conspiracy that was formed was one formed from Bewster, New York, to New York City between Glen Snow, Samuel Snow and Jules Votraw. That conspiracy with the over act and furtherance of the same took place in the Southern District of New York. Hyde vs US 225 U.S. 347; Ladner vs US 168 Fed. 2d 771; Pullin vs US 104 Fed. 2d 57; Singer vs US 208 Fed. 2d 477; Bartoli vs US 192 Fed. 2d 130; Smith vs US 92 Fed. 2d 460. A conspiracy case may be laid in the district where the conspiracy was formed or where the overt act or further-

ance of the same took place. In searching for the venue of a conspiracy act, the place where the conspiracy was formed appears to be the focal point in setting the venue. A review of the evidence would show that the conversations between Mangor and both Snows could not as a matter of law have been a conspiracy. When did this conspiracy become formed? The only time that the agreement and the meeting of minds could have taken place was on the trip from Brewster to New York City and the overt act of making the trip took place in that district.

The Court should have set aside the veridct due to lack of jurisdiction.

Further, the Court should have set aside the veridct for failure of the government to prove the facts as alleged in the indictment and bill of particulars, for which the defendant was on trial. Proof of the specific allegation of the pleadings was lacking to establish guilt of the defendant of conspiracy to distribute cocaine.

CONCLUSION

The conviction of Glen Snow should be reversed and his indictment dismissed.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

UNITED STATES OF AMERICA

Appellee

-against-

GLEN A. SNOW

Appellant

STATE OF NEW YORK)
COUNTY OF ALBANY) SS.:

THOMAS J. NEIDL, being duly sworn, deposes and says: that he is over 18 years of age and not a party in this action and served two (2) copies of appellant's brief in the above entitled matter on U. S. Attorney be leaving said two (2) copies in the U. S. Attorney's office, Post Office Building, Broadway, Albany, New York.

Thomas J. Neidl
THOMAS J. NEIDL

Sworn to before me this
12 day of April, 1976.

Notary Public, State of New York